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Married Women's Acknowledgments In Florida.

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COMMENTS

MARRIED WOMEN'S ACKNOWLEDGMENTS IN FLORIDA

Many Florida practitioners today are reluctant to give up the time-honored custom of taking the wife and a notary into a separate room, apart from the husband, in order to obtain her acknowledgment to a conveyance of real property "free from his coercion or undue influence," despite the enactment of a statute in 1943 abolishing the necessity for such separate acknowledgments.[1]

[1] Sec. 693.03, Fla. Stat. 1941, Laws 1943, c. 21746, par. 1: "The acknowledgment by a married woman of deeds, conveyances, mortgages, relinquishments of dower, contracts for the sale of lands, powers of attorney and other instruments shall be necessary to entitle any such instrument to be recorded, but no private examination separate from the husband of such married woman shall be necessary for any purpose, and the acknowledgment of such instrument by a married woman shall not constitute any part of the execution of any such instrument. Any form

Apparently this statute has left not only many members of the Florida bar with the feeling that the Legislature had done something which could not be done, but some of our courts as well. Actually, the ceremony of separate acknowledgment, far from being one of the ancient institutions of the common law, is a creature of statute and did not come into existence until the nineteenth century.[2]

Originally a feme covert, with or without the consent and concurrence of her husband, could not convey any estate of which she was seized either in her own right or through her inchoate right of dower. Thus the common law declared the wife to be incapable of making a conveyance. In order to evade this prohibition the collusive proceeding of fine and recovery was devised.[3] Because this proceeding threw wide the doors to frauds of many kinds, the fine and recovery was barred by statute,[4] and the practice of conveying by joint deed of husband and wife arose,[5] with, however, the statutory restriction being imposed that the deed of conveyance must be acknowledged by the wife in a private examination.[6]

From 1835 until 1943 the laws of Florida were zealous in the protection afforded the wife from the supposed dishonesty and corruption of the husband. In Florida, the statute in force until 1943 required by its terms not only a privy examination but a long recital of non-compulsion.[7]

It may thus be seen that the abolition of the separate acknowledgment is nothing more or less than the repeal of a statute of comparatively recent origin in an effort to sweep away another archaic legal procedure and adjust our law to the realities of present-day economic and social conditions.

Prior to 1943 the married woman's acknowledgment was essential to the validity of the instrument insofar as her separate estate or dower right was concerned.[8] With the enactment of the new statute, the question arises as to the present day legal effect of the married woman's acknowledgment.

To better answer this question it is necessary to examine briefly the history of the acknowledgment. This is another ceremony unknown to

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of certificate of acknowledgment which is sufficient in the case of an acknowledgment by a single person shall be sufficient in the case of an acknowledgment by a married woman. . . ."

[2] Stat. 3 & 4 William IV, c. 74 (1833); Act. Feb. 4, 1835, par. 1 (Fla.); Nicholl v. Jones, 2 H. & M. 588 (1865), Kerr v. Russell, 69 Ill. 666, 18 Am. Rep. 634 (1873); Williams v. Paine, 169 U.S. 55 (1897).

[3] Newnan v. Equitable, etc., 119 Fla. 641, 160 So. 745 (1935); Martin v. Dwelly, 6 Wend. (N.Y.) 9, 21 Am. Dec. 245 (1830).

[4] Sec. 689.08 Fla. Stat. 1941; Stat. 3 & 4 William IV, c. 74. But see In re Hester's Estate (Fla.) 28 So. (2d) 164 (1946).

[5] Scott v. Fairlie, 81 Fla. 438, at 446, 89 So. 128 (1921).

[6] Sec. 693.03, Fla. Stat. 1941 prior to 1943 amendment.

[7] *Ibid.* The statute required a recital "that she executed the same freely and voluntarily and without compulsion, constraint, apprehension or fear of or from her husband."

[8] *Ibid.*

the common law. It was developed as a result of the passage of the Statute of Enrollments, which required the enrolling clerk to have evidence that the instrument produced had in fact been executed.[9] This gave rise to the practice of having the grantor acknowledge his deed before some authorized officer. The acknowledgment, however, was required only for the purpose of affording proof of due execution of the instrument in order to permit the recordation thereof in the public records.[10] The acknowledgment had reference solely to proof of execution and not to the force, effect or validity of the instrument. This is the law of Florida today.[11]

The acknowledgment itself is not necessary for the actual conveyance of real property. It is only a prerequisite to the recording of the instrument in the public records.[12]

However, this view of acknowledgments was not accepted in Florida with respect to the acknowledgments of married women, for the statute in force until 1943 required the separate acknowledgment of the married woman in order to make her conveyance effective.[13] Unless there was such an acknowledgment the deed was a nullity so far as the estate of the married woman was concerned.[14]

The 1943 statute changed this rule and by its terms gave the married woman's acknowledgment the same status as the acknowledgment of any other person, to-wit: the acknowledgment serves only as a prerequisite to recordation, and no longer constitutes "any part of the execution of any such instrument."[15]

It is therefore logical to assume that since the passage of the 1943 act the mere joinder of the wife with her husband in the execution of any instrument involving real estate is sufficient to pass title to all their interests therein, including the wife's separate estate and dower, or to otherwise bind the parties in accordance with the terms of the instrument.

Unfortunately, however, this conclusion is upset by an unexpected recent holding of the Florida Supreme Court.[16] The action involved a suit for specific performance of a contract to convey realty. The Court in a five-two decision held that the contract could not be enforced

[9] 27 Henry VIII c. 16 (1536).

[10] See Catlin v. Washburn, 3 Vt. 25, at p. 36.

[11] Sec. 689.01, Fla. Stat. 1941; Marsh v. Bennett, 49 Fla. 186, 38 So. 237 (1905); Harris v. Zeuch, 103 Fla. 183, 137 So. 135 (1931).

[12] Sec. 695.03, Fla. Stat. 1941. It must be remembered, however, that the instrument will not be effective as to creditors and subsequent purchasers without notice unless the instrument is recorded. Sec. 695.01, Fla. Stat. 1941.

[13] Sec. 693.03, Fla. Stat. 1941 prior to 1943 amendment.

[14] Adams v. Malloy, 70 Fla. 491, 70 So. 463 (1915), quoting Sec. 693.03, Fla. Stat. 1941 prior to amendment.

[15] Sec. 693.03, Fla. Stat. 1941 as amended by Laws 1943 c. 21746 par. 1-3.

[16] Berlin v. Jacobs (Fla.) 24 So. (2d) 717 (1946).

because of the inhibitions of Sec. 708.07, Florida Statutes, 1941.[17] The Court held that this section had not been modified or superseded by certain other sections of the Florida Statutes,[18] and then laid down the doctrine that contracts to convey must "be executed and acknowledged in the form prescribed for conveyances of real property," in order to be specifically enforced.[19]

The decision apparently completely ignores the provisions of the 1943 act with reference to married women's acknowledgments, though that act by its terms makes such acknowledgments no "part of the execution of any such instrument" and by its terms includes "contracts for the sale of lands" in its provisions.[20] The 1943 act specifically repealed all laws in conflict with it,[21] and it would seem that this provision should serve to repeal the acknowledgment requirement of Sec. 708.07 since that section was made a part of the law in 1892.[22]

The Supreme Court has not chosen to take this position, and as a result Berlin v. Jacobs destroys much of the usefulness of the 1943 acknowledgment act. While the opinion does not hold the contract void, it denies the holder the right to enforce the same by court proceedings, and thereby reaches the same result.

As a consequence, a shadow is thrown over the entire provisions of the 1943 act, and the coming legislature would do well to make such amendments as are necessary to Sec. 708.07 and other sections of the statutes to make them conform without possible question to the progressive spirit of the 1943 act.

THE GIFT TAX AND DIVORCE SETTLEMENTS

Few men when making a transfer of property under a divorce settlement feel that they are making a "gift". More often than not they feel that they are meeting the hard terms of a closely-bargained contract. The Commissioner of Internal Revenue is not interested, however, in the transferor's subjective feelings in such a matter. He

[17] Sec. 708.07, Fla. Stat. 1941: "Coverture shall not prevent a decree against husband and wife to specifically perform their written agreement to sell or convey the separate property of the wife, or to relinquish her right of dower in the property of the husband, but no agreement for the sale or conveyance of her real property or for relinquishment of dower, shall be specifically enforced unless it be executed and acknowledged in the form prescribed for conveyances of her real property and for relinquishment of dower."

[18] Sec. 708.08, 708.09, 708,10, Fla. Stat. 1941 as amended by Laws 1943 c. 21932 and 21696.

[19] Berlin v. Jacobs, supra., p. 718.

[20] Sec. 693.03, Fla. Stat. 1941 as amended by Laws 1943 c. 21746 par. 1-3. cf. Note 1.

[21] Laws 1943, c. 21746, sec. 3.

[22] Rev. Stat. 1892, sec. 2076.